Supreme Court, U.S.
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No. 95-258

In The

Supreme Court of the United States

October Term, 1995

JAMES E. JONES, JR., *et al.*,

Petitioners,

v.

SHANNON RICHEY FAULKNER,

Respondent,

and the

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONERS' REPLY MEMORANDUM

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1. As a threshold matter, we note that Shannon Richey Faulkner[1] has filed an opposition ("Faulkner Opp.") to our petition even though she no longer has any conceivable legally protectable interest in this matter. On August 18, Faulkner voluntarily withdrew from The Citadel, and made clear that she no longer wishes to pursue a Citadel education. When Faulkner withdrew from The Citadel, her claims became moot. The United States agrees that "any issue with respect to [Faulkner's] standing [to challenge The Citadel's males-only admission policy] is now moot in view of her withdrawal from The Citadel," Brief for the United States in Opposition ("U.S. Opp.") at 9 n.10, and even Faulkner does not contend otherwise in her brief in opposition. In light of these events, we have today filed a suggestion of mootness requesting that Faulkner's own petition for certiorari in this case, No. 95-31, be denied as moot. Faulkner's brief in opposition, likewise, should be disregarded.

2. The bulk of Faulkner's and the United States' arguments in opposition to our petition for certiorari flow from their mischaracterization of the court of appeals' decision. They claim that we have misrepresented the Fourth Circuit's decision by describing it as (1) upholding The Citadel's males-only admission policy as substantially related to an important governmental purpose, but (2) concluding that South Carolina violated the Equal Protection Clause in offering this type of single-gender educational program only to men. U.S. Opp. at 8 n.8; Faulkner Opp. at 10-11, 13. Our description is a true and faithful reading of the court's holding, as the words of the court of appeals itself make clear.

In *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993) (*Faulkner I*) (appended to Faulkner's Petition for Writ of Certiorari, filed July 10, 1995 (No. 95-31) at 70a-100a), the Fourth Circuit described its decision in *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992) (*VMI I*), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2431 (1993), as follows:

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[1] Because Faulkner has filed her own petition for certiorari, we refer to Faulkner and the United States collectively as "plaintiffs" rather than "respondents." For the same reason, we refer collectively to The Citadel, the Military College of South Carolina, and the State of South Carolina as "defendants."

> With respect to the educational program, we observed that scientific studies offered into evidence supported the conclusion that single-sex education is pedagogically justifiable both for males and females. . . . Thus, with respect to both VMI's military and educational aspects, we held that a single-gender policy was justified by an important state purpose and that the state could appropriately offer a single-gender military education.
>
> While providing a single-gender military education was held to constitute an appropriately important state purpose, we could find no state policy justifying Virginia's decision to offer this unique type of education only to men.

Faulkner I, 10 F.3d at 231-32 (Faulkner Pet. 76a-77a). The court of appeals added: "[W]e can perceive no reason why our holding in *VMI* would not apply in this case." *Id.* at 232 (Faulkner Pet. 78a).

In *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) (*Faulkner II*), the Fourth Circuit described its binding precedents in *VMI I* and *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) (*VMI II*) as follows:

> In [*VMI I*] . . . , we held that Virginia's maintenance of a male-only admission policy at Virginia Military Institute (VMI) without the provision of a comparable opportunity for women was not justified by a state policy of providing diversity in education, and we therefore concluded that Virginia was violating the Equal Protection Clause. . . .
>
> In *VMI II*, . . . we held that Virginia's plan of providing single-gender education is not a pernicious state objective. On the contrary, because the state presented sufficient data to support the proposition that a sexually-neutral environment yields concrete educational benefits, we concluded that Virginia could opt for single-gender education as a legitimate and important part of its overall objective of providing higher education to its citizens. We noted, however, that when providing single-gender education to one gender, Virginia could not,

> without adequate justification, deny a substantively comparable benefit to the other gender. . . .
>
> The principles stated in *VMI I* and *VMI II* apply to this case.

Faulkner II, 51 F.3d at 443-44 (Faulkner Pet. 3a-4a). Again, the courts below, as well as the parties, have proceeded in this case on the assumption that The Citadel's males-only admission policy, no less than VMI's identical policy, is substantially related to an important governmental purpose. The only issue tried in the district court and reviewed by the court of appeals in this case was the entirely distinct question, injected into the proceedings by the court of appeals, whether the absence in South Carolina of an all-female military program like The Citadel is constitutionally justified by the absence of any demand for it.

For similar reasons, there is simply no merit to Faulkner's claim that the findings affirmed by the court of appeals with respect to VMI's single-sex adversative educational program do not apply as well to The Citadel's virtually identical educational program. Faulkner Opp. at 11-12. As the United States has itself recognized, "[w]ith regard to 'the issue of whether single-sex education has pedagogical value,' . . . the records in the [*VMI* and *Faulkner*] cases are the same. . . . " Memorandum for the United States in Opposition at 8 n.5, *Faulkner v. Jones* (No. 95-31) (citation omitted). In *Faulkner I*, the court of appeals noted that the circumstances of this case are "strikingly similar to those before [the Court] in the *VMI* case," 10 F.3d at 231 (Faulkner Pet. 75a), and determined that, "we can perceive no reason why our holding in *VMI* would not apply in this case." *Id.* at 232 (Faulkner Pet. 78a). The district court, on remand, noted that VMI was also a males-only military institute "whose primary mission and educational methods are almost identical to The Citadel's" and that the United States' suit against VMI "raised the identical issues presented in the instant litigation." *Faulkner v. Jones*, 858 F. Supp. 552, 554 (D.S.C. 1994) (Faulkner Pet. 34a). In light of these facts, the district court "saw no reason to retry all of the issues addressed in *VMI*. Instead, it chose to try only justification, the only issue that the defendants claim separates them from VMI. . . . " *Id.* at 555 (Faulkner Pet. 36a). Finally, as the district court noted, even plaintiffs accepted the *VMI* holdings "for purposes of their motion

for summary judgment." *Id.* at 555 n.5 (Faulkner Pet. 36a). In *Faulkner II*, the court of appeals observed that the *VMI* holdings "fairly must be construed to apply also to The Citadel," 51 F.3d at 447 (Faulkner Pet. 11a), and reiterated its conclusion in *Faulkner I* that there was no perceptible reason "why our holding in [*VMI*] would not apply in this case." *Id.* at 448 (Faulkner Pet. 13a) (quoting *Faulkner I*, 10 F.3d at 232).

3. Plaintiffs' mischaracterization of the decisions below also infects their response to our argument that the courts below lacked jurisdiction to reach the constitutional justification for the absence in South Carolina of an all-female military program like The Citadel. In our petition we demonstrated that neither Faulkner nor the United States has challenged South Carolina's failure to provide an all-female educational program like The Citadel's. To the contrary, both plaintiffs have alleged only that The Citadel's exclusion of qualified females from its Corps of Cadets violates the Equal Protection Clause. The court of appeals, having concluded that The Citadel's males-only admission policy satisfies the equal protection standard established by this Court in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), fully resolved the only claim placed before it. The courts below exceeded their jurisdiction under Article III when they considered and decided the entirely distinct question whether South Carolina is constitutionally obliged, in light of The Citadel's males-only admission policy, to establish an all-female military program like The Citadel.[2] *See* Pet. at 3-4, 15-21.

Significantly, both the United States and Faulkner concede that they have no interest in the establishment of an all-female military institution like The Citadel. *See* U.S. Opp. at 9-10; Faulkner Opp. at 15. But they seek to characterize the question of

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[2] Faulkner argues that the issue regarding the absence of an "all-female Citadel" was not injected into this case by the courts below, *sua sponte*, but rather by The Citadel itself, when it offered the lack of demand for such an institution as its "justification" for not providing it. Faulkner Opp. at 13-14. Faulkner ignores, however, that The Citadel was obliged to offer this "justification" only because the court of appeals, first in *VMI* and then in this case, addressed not only the constitutionality of VMI's and The Citadel's males-only admissions policies, but also the issue (not raised by *any* party) whether the failure to provide a single-sex program to women was itself justified.

whether South Carolina is constitutionally required to establish such an all-female program as merely relating to the proper "remedy" for defendants' supposed equal protection violation. *See* U.S. Opp. at 9-10; Faulkner Opp. at 15. As we have demonstrated above, however, the Fourth Circuit's *liability* determination against defendants was based on the absence of an all-female military institution like The Citadel. In light of this fact, and in light of the *undisputed* fact that neither plaintiff has alleged a personal stake in the question whether defendants were constitutionally required to establish such an all-female military program, there is simply no "case or controversy" between the parties with respect to that question. At the very least, the justiciability issue raised in our petition is sufficiently substantial and important to warrant the Court's review.

Nor is there any merit in the United States' contention that acceptance of our justiciability argument "would simply remove [the] remedial option" of establishing an "all-female Citadel" and would thus require defendants to "remedy" their alleged equal protection violation by coeducating The Citadel. U.S. Opp. at 11; *see also* Faulkner Opp. at 13. If we are right that the courts below lacked jurisdiction to decide the "all-female Citadel" issue, the question of remedy does not arise at all, for the only question that the courts did have jurisdiction to decide – whether The Citadel's males-only admissions policy satisfies the test this Court laid down in *Hogan* – was decided in *defendants'* favor.

Finally, both Faulkner and the United States rely heavily – indeed, exclusively – on this Court's decision in *Heckler v. Mathews*, 465 U.S. 728 (1984), for their answer to the jurisdictional question raised in our petition. This Court held in *Mathews* that a male applicant for social security benefits had standing to challenge a gender classification codified in the social security laws even though invalidation of the classification could result in the denial of benefits to both men and women rather than in the extension of benefits to men. The *Mathews* Court held that the male applicant nonetheless had standing because his injury was the denial *to him* of equal treatment. *Id.* at 737-40. For present purposes, however, what is significant about *Mathews*, and what distinguishes that case from this one, is that the plaintiff in *Mathews sought and applied for* the social security benefits at

issue. Here, in contrast, both Faulkner and the United States have sought only coeducation of The Citadel and have unequivocally opposed the establishment of a parallel military program for women. *Mathews* would be helpful to plaintiffs only if we were contesting plaintiffs' standing to challenge The Citadel's exclusion of women. But neither *Mathews*, nor any other case of which we are aware, has so stretched the limits of standing doctrine to suggest that plaintiffs who have unequivocally renounced any interest in attending an all-female military institution nevertheless have standing to challenge the absence of such an institution.[3] Rather, this Court's decisions are uniformly to the contrary. *See* Pet. at 17-20.

4. Quite apart from the fact that the courts below lacked jurisdiction to reach the question whether the absence of an all-female educational program violates the Equal Protection Clause, the undisputed lack of demand in South Carolina for an all-female military institution like The Citadel constitutes a complete defense to such a claim. The United States' and Faulkner's response to our "lack of demand" argument is twofold.

First, they argue that the lack of demand issue does not warrant this Court's review because it is "fact-based," U.S. Opp. at 11, and both the district court and the Fourth Circuit found that there was no evidence of such a lack of demand. *See* U.S. Opp. at 11-12; Faulkner Opp. at 16-17. The district court, however, specifically found that "[t]here does not appear to be any substantial interest in South Carolina for the establishment of an all-female military institution like The Citadel." *Faulkner*, 858 F. Supp. at 560

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[3] As previously noted, the United States has recognized that "any issue with respect to [Faulkner's] standing [to challenge The Citadel's males-only admissions policy] is now moot in view of her withdrawal from The Citadel." U.S. Opp. at 9 n.10. This conclusion, however, is inconsistent with the United States' position on the justiciability issue. If the United States' expansive reading of *Mathews* is correct, then Faulkner's withdrawal from The Citadel should not moot her challenge to The Citadel's admission policy, because, irrespective of the fact that she no longer seeks admission to the Corps of Cadets, The Citadel's admission policy still denies "equal treatment" to women, and that denial of "equal treatment" can be "remedied" by the cessation of public support for The Citadel. The fact that the United States cannot bring itself to embrace the logical implications of its argument is telling.

(Faulkner Pet. 46a). The court of appeals did not question, and could not responsibly have questioned, the validity of the district court's conclusion that there is no significant interest in an all-female military institution like The Citadel. Rather, Judge Niemeyer, the author of the panel majority opinion, focused on the broader issue of female demand for single-gender education in general. As we have explained at length in our petition, Pet. at 22, 25, 28, Judge Niemeyer erred as a matter of law in defining the relevant inquiry, in assessing liability, as female demand for single-gender higher education generally, as opposed to demand for an all-female military program like The Citadel. Pet. at 22, 28. Significantly, neither the United States nor Faulkner responds to this point. Rather, both Faulkner and the United States focus upon the court of appeals' statement that "the attorney representing South Carolina . . . concede[d] at oral argument, [that] there really is no data before this court to support a finding of an absence of demand among women at the present time for public single-gender education of any type." *Faulkner II*, 51 F.3d at 446 (Faulkner Pet. 9a). *See* Faulkner Opp. at 7; U.S. Opp. at 12, 13 n.13.

Notwithstanding Judge Niemeyer's reference to demand for single-gender education "of any type," even a cursory review of the relevant portion of the transcript of the Fourth Circuit oral argument demonstrates that the "concession" to which the court of appeals was referring has nothing to do with the relevant demand issue in this case. Counsel for South Carolina made clear that the district court found below that there was *no* interest for a "military college for women in South Carolina." Transcript of Oral Argument held Jan. 30, 1995 in *Faulkner II* at 17. Judge Niemeyer then stated that the last "evidence we had was 2300 women." *Id.* This figure, however, does not relate to the level of demand for an all-female Citadel, but rather to the number of women attending Winthrop College shortly before that college became coeducational in the early 1970's. Noting that that number was from 20 years ago, Judge Niemeyer then stated that "[w]e don't have any data then," apparently referring to the absence of any *current* data. South Carolina's counsel replied "[w]e really don't." *Id.* As this passage illustrates, counsel's statement constitutes, at most, a "concession" that there is no current data on how many women would attend Winthrop College if Winthrop were still a single-gender

institution. It is *not* a "concession" that there is no evidence relating to the level of demand for an all-female Citadel.[4] Indeed, any such "concession" would be belied by the record, which contains ample evidence that there is no significant demand in South Carolina for an all-female Citadel. *See* Pet. at 9.

In addition to disingenuously suggesting that there is no evidence of lack of demand among women for an all-female military institution like The Citadel, both Faulkner and the United States also argue, based upon race discrimination cases of this Court from the separate-but-equal era, that any such lack of demand is legally irrelevant. Faulkner Opp. at 18-19; U.S. Opp. at 13-14. As we have noted, Pet. at 27-28, under the pre-*Brown* equal protection standard applicable in cases such as *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) and *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151 (1914), a state's exclusion of blacks, even a single black, from a state-supported educational program was permissible *only* if the state provided an equivalent program to blacks. Since equality of treatment was the only constitutionally adequate justification for the separation of the races under these cases, a state could not decline to provide equal treatment to particular individuals merely because there was limited overall demand for an equivalent program. In this case, by contrast, equality of treatment is *not* the justification for The Citadel's males-only admissions policy. Rather, in upholding the males-only admission policies of both The Citadel and VMI, the Fourth Circuit found, based on an unrebutted record of expert testimony and scholarly literature, that a single-sex educational environment is pedagogically beneficial to a substantial number of college students, both male and female, and that the pedagogical benefits of

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[4] Far from conceding that there is no evidence of demand for an all-female Citadel, counsel for The Citadel emphatically agreed at oral argument with Judge Hamilton's statement that no one had challenged the district court's finding "that there was little or no demand in South Carolina for a . . . single-gender, female Citadel-type education." Transcript at 4.

In contrast to the nonexistent demand for an all-female Citadel, South Carolina's women's leadership institute at Converse College, modeled after the program at Mary Baldwin College in Virginia, has 23 enrollees in its initial school year which recently began, even though recruiting for this program did not start until late June.

single-sex higher education would be lost if these institutions were coeducated. Given that The Citadel's males-only admission policy is constitutionally justified, it follows as a matter of common sense that an all-female military institution like The Citadel need not be established in the absence of any demand for it.

5. Finally, the United States argues that our petition is premature in light of the pendency of the district court's remedial proceedings. U.S. Opp. at 15. This argument is once again premised on the facially erroneous claim that our petition raises questions relating only to the issue of remedy. In truth, both questions raised in our petition relate to *liability*, not *remedy*, and thus will be unaffected by the district court's decision on the adequacy of our proposed remedy.[5]

The usual concerns cautioning against review by this Court of nonfinal decisions are not implicated here. While the Court has expressed its reluctance to review nonfinal judgments out of a concern that a contrary policy would result in an excessive "burden of litigation in this court," *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 382 (1893), in the instant case the Court already has before it two requests to review the final judgment in *VMI*, a judgment which raises issues that are closely related to those raised here by defendants. In fact, the substantial similarity of the factual records in both this case and *VMI*, and the fact that this case raises liability issues – such as the lack of demand issue – which are not raised in *VMI*, suggest that the interests of judicial economy would be well served by reviewing these cases at the same time.

This Court has on many occasions granted certiorari to review nonfinal judgments when the usual concerns counseling against

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[5] The United States' confusion on this point is apparent from its statement that if our proposed remedy "does not pass constitutional muster, petitioners, who do not otherwise challenge the court of appeals' liability decision, will have to adopt an alternative remedy, such as a sex-neutral admissions policy at The Citadel. Adoption of that remedy would obviate any need to address the questions petitioners seek to raise here." U.S. Opp. at 15-16. Because the United States' assertion that we "do not otherwise challenge the court of appeals' liability decision" is patently wrong, so also is its conclusion that an "adverse decision in the remedial proceeding would obviate any need to address the questions" we have raised in our petition.

such review are not present or where the issues sought to be reviewed are sufficiently important.[6] Given the importance of the questions raised by our petition, and the fact that this Court already has before it a request to review a similar case, the Court should not deny our petition as premature.

Respectfully submitted,

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Dated: September 19, 1995

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[6] *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976); *United States v. GMC*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Land v. Dollar*, 330 U.S. 731 (1947).